17586

No. 17[illegible]2

United States

COURT OF APPEALS

for the Ninth Circuit

LEON DUDLEY NOAH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

Jurisdiction of the District Court is conferred by 18 USC § 3231. Jurisdiction of this Court to review the judgment of the District Court is conferred by

28 USC §§ 1291 and 1294(1) and Rule 37(a), Federal Rules of Criminal Procedure.

STATUTES

Title 26 USC 4704 (a)

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Title 26 USC 4705 (a)

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Title 21 USC 174

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and in addition may be fined not more than

$20,000. For a second or subsequent offense, the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Federal Rules of Criminal Procedure, Rule 30, 18 USCA

"*Instructions*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Federal Rules of Criminal Procedure, 52 (b), 18 USCA

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

Although defendant's statement of the case is substantially correct, it is felt that certain additions and clarifications should be made.

Transaction of October 3, 1960

Special employee Love had made prior arrangements with the defendant to purchase narcotics on the mentioned date (Tr. 78) in front of the Oregon State Liquor store at 3532 Northeast Union Avenue in Portland. At about 5:15 - 5:30 P.M. Love met elsewhere with Narcotics agents Gooder and Windham and Portland City Officers, Putnam and Schafer (Tr. 2, 41, 56, 64). Love was supplied with a special 1952 Studebaker automobile (Tr. 38, 54, 64) which had been used by the officers in previous narcotics investigations (Tr. 54). The automobile and special employee were searched (Tr. 3, 22, 26, 56, 76), afterwhich Gooder concealed himself in the trunk of the car in such a manner as to enable him to observe the interior through an opening formed by the lowering of the back seat (Tr. 3, 15, 16, 55, 65, 68).

Love, who had been supplied with government funds, then proceeded to the roundevous at the liquor store followed by Windham and Schafer in one automobile and Putnam in another. At about 5:40 P.M. (Tr. 3, 14, 41, 57) defendant, who was visible to Gooder for 15 to 20 feet (Tr. 3, 18), was hailed by Love with "Hi partner. What's doing?" (Tr. 4). De-

fendant responded by inquiring as to what was going on, and whether Love was "ready" (Tr. 77). Defendant leaned through the window, took a rubber fingerstall (rubber finger protector) from his mouth and passed it to Love who in turn paid him $80.00 (Tr. 4, 18, 77).

Defendant then walked into the liquor store (Tr. 27, 57, 65, 77). Windham and Schafer observed defendant approach and leave from their car stationed at a vantage point estimated to be 200 to 300 feet away (Tr. 41, 42, 60). Putnam also observed and identified defendant from a distance which does not appear to be in the record. After the special employee's Studebaker and the automobile containing Windham and Schafer had left, Putnam remained and observed defendant enter a two-tone gray 1952 Pontiac with a temporary license sticker on the windshield. Putnam drove around the block twice and left while defendant was still seated in the Pontiac (Tr. 65-66).

Subsequent analysis of the contents of the fingerstall revealed a narcotic derivative.

Defendant produced a Pasco, Washington automobile dealer named Jeffries who testified that he saw defendant sometime during the day of October 3 in Pasco, Washington, 230-240 miles away (Tr. 90). Defendant himself testified that he had arrived in Pasco by train from Portland at about 2:00 on the morning of October 3, 1960, and had been picked up by Jeffries at his home at about 10:30 - 11:00 A.M. (Tr. 112-114).

Transaction of November 23, 1960:

On the morning of November 23, 1960, special employee Love met with agents Windham and Gooder, and officer Bisenius at a north Portland location. After searching Love's person and automobile and after furnishing him with $50.00 government funds (Tr. 30, 79), Love, under the surveillance of Windham and Gooder (Tr. 30, 70) drove to the Kienow Grocery store parking lot.

After parking in the lot, Love waited a few minutes in his automobile and then crossed the street to a service station telephone booth to place a call to defendant for the purpose of completing arrangements for the sale (Tr. 70, 30, 79). He was informed that defendant had already departed. Upon return to his automobile and after speaking to Windham, who had followed on foot (Tr. 31, 80), Love moved his automobile to a better point within Gooder's observation (Tr. 31. 80).

At about 11:30 (Tr. 8-9) defendant walked out of the rear door of Kienows and entered Love's car. Love asked him why he couldn't get "spoons" (1/16 ounce narcotic). Defendant replied that he had run short, and that possibly later he could obtain more for him. At that time the defendant handed Love a cellophane wrapper containing five capsules in exchange for $50.00 (Tr. 80). After completing this transaction, both participants departed, and Love returned, with Windham and Bisenius following, to the original meeting place (Tr. 31, 9, 71). The capsules were de-

livered to Windham who searched Love and his vehicle again (Tr. 31, 50).

Defendant, in defense, testified that at about 10:00 - 10:30 A.M. on November 23, 1960, he went to the Kienow lot to deliver a message for "Joe" to the effect that "Joe" could not meet Love at a designated time. Love was alleged to have alighted from his car and the message was delivered while both were standing at the back door of the store (Tr. 119-121). Defendant returned to "Joes" and later boarded a plane for Pasco, Washington. During the course of testifying, defendant volunteered that he made his living as a professional gambler (Tr. 111).

Defendant has assigned three specifications of error:

"1. The trial court erred in its refusal to allow defendant's witness to show the color motion films of the scene of the alleged transaction on October 3, 1960 on the ground of objection that 'it is immaterial, irrelevant, incompetent, and remote in time and place as to the alleged transaction'. (TR. pg. 104)

"2. The trial court erred in the refusal to grant defendant's motion for judgment of acquittal and directed verdict as to the alleged transaction of November 23, 1960.

"3. The trial court erred in its instructions to the jury as the sum total of such instructions, through omission and commission, was highly beneficial to the prosecution and prejudicial to the defendant."

ARGUMENT

I. The Trial Court Did Not Err in Its Refusal to Allow Defendant's Witness to Show the Color Motion Films of the Scene of the Alleged Transaction of October 3, 1960.

As grounds for the admission of the color films, defendant's counsel urged that, although taken at a later date, the films would show that *because of traffic conditions* and *light conditions,* the view of the scene of the October 3, 1960 transaction was severely limited (Tr. 102). Since the films were taken on March 2, 1961 (Tr. 101), the Court on further interrogation brought out that defendant had hoped to recreate the same light conditions on film by shooting movies at the scene on a winter Oregon day that had approximately the same sunset as the fall Oregon day in question (Tr. 103-104). The court announced that it would sustain an objection to the film but would permit the photographer to testify to what he could observe. After this ruling, the government objected on the grounds that the proposed exhibit was "immaterial, irrelevant, incompetent, and remote in time and place as to the alleged transaction" (Tr. 104). No formal offer of proof was made nor was the film made a part of the record.

Although questionable, it will be assumed that there is sufficient material in the record to enable this Court to review the specification of alleged error.

A. *The Question of Admissibility of Color Motion Films Is a Matter Within the Discretion of the Court Which Discretion Was Properly Exercised.*

A reading of the photographer's testimony (Tr. 101-110) will show that the film was not offered for the purpose of showing what could be seen at the scene by way of physical character or obstructions to view, but was offered for the purpose of showing that because of light conditions, and distance, the facial features of a colored man could not be readily recognized by the human eye from certain vantage points.

In order to permit such a film in evidence, the court would have had to satisfy itself as to two necessary parts of the required foundation:

(1) Whether the exposure of a scene through the "regular lens" at "normal" setting of a Revere 8-millimeter camera counld produce a negative on Kodak Kodachrome daylight film (Tr. 102) which when flashed through a projector of unknown description on a large screen in a darkened room would produce two-dimensional light color and distance impressions similar to the impressions available to a human eye viewing the scene.

(2) Whether the conditions at the scene at the time filmed on March 2, 1961, were sufficiently similar to the conditions existing at the same place on October 3, 1961, to be of aid to the jury.

In the first part of the foundation, the question raised is whether a camera is an appropriate medium

to demonstrate light, color, and distance. The court in the light of the evidence adduced in qualifying a lawyer as a photographer could easily conclude that the failure of the film to register sufficient features of a person under certain conditions of light, color, and distance would be irrelevant on the question of whether the human eye could adequately distinguish those features under the same conditions. No attempt was made to present testimony, expert or otherwise, to lay this foundation.

In *Sprinkle* v. *Davis* (C.A. 4th, 1940), 111 F.2d 925, moving pictures were offered in an automobile damage case to show how far from a particular point at an intersection a car approaching from another direction could be seen. In approving the lower court's rejection of this evidence, the appellate court said:

> "Whether a physical situation can be correctly portrayed by moving pictures is a question which must be left to the sound judgment and discretion of the trial judge."

In *Chicago* v. *Robinson* (C.A. 8th, 1939), 101 F.2d 994, films taken along a railroad track were admitted in a personal injury case for the purpose of showing the visibility to a train crew of a person lying on the tracks. Objection was interposed to the effect that there was no showing that the human eye could have seen as easily and plainly as the camera registered. The jury was instructed that the lense and film of the camera were not necessarily the real test of what the human eye would have seen. In view of this instruction, the appellate court held that the

admission of the films was within the sound discretion of the court.

Other authorities upholding the rule that the admissibility of moving pictures is within the sound discretion of the court are: *Stone* v. *Chicago* (C.A. 8th, 1931), 53 F. 2d 813; *Willis* v. *Pennsylvania* (C.A. 4th, 1959), 269 F.2d 549; *Finn* v. *Wood* (C.A. 2d, 1950), 178 F.2d 583; Annotations 62 ALR 2d 686; 19 ALR 2d 877; 9 ALR 2d 921.

In regard to the second part of the necessary foundation, defendant had the burden of showing that the conditions of light, distance, and traffic existing at the time of filming were similar to the corresponding conditions on October 3, 1960. Defendant, who denied being present in Portland on the date in question, had no witness to identify the conditions at the time and location of the alleged crime. His reliance therefore had to shift to the testimony of the government witnesses to establish the foundation.

Gooder testified that it was daylight and that he could see "very good" (Tr. 14). Windham testified that the light was good, that he could see "quite well" (Tr. 41), and that probably the light was good enough to take pictures (Tr. 43). In contrast to this, McMurry testified that on March 2, 1961, the date the films were taken, the sky was overcast, although sporadically the sun was visible (Tr. 101, 107). Thus, assuming that the sunsets on both days were substantially at the same time, the record would not support the conclusion that the light conditions as

influenced by the clouds were also substantially the same.

In regard to traffic conditions, there was no testimony describing the traffic situation on October 3, 1960. Consequently, the record would not support the conclusion that traffic conditions on the date of the film were similar.

On the basis of the foregoing, the trial court correctly decided that the films were inadmissible. Such ruling is in accord with the decisions holding that the sufficiency of the *foundation* for the introduction of films is within the discretion of the trial judge. See *Martin* v. *Klein* (D.C. Mass. 1959), 172 F. Supp. 778; *Coupe* v. *U.S.* (C.A. D.C. 1940), 113 F.2d 145; *Stone* v. *Chicago* (C.A. 8th, 1931), 53 F.2d 813; *Millers* v. *Wichita* (C.A. 10th, 1958), 257 F.2d 93.

In summary, the showing of a film taken on March 2, 1961, wherein the scene did not register on the film sufficiently to identify facial features was properly within the discretion of the trial judge. Also, the total lack of evidence in the record of light and traffic conditions on the day of the alleged crime would not permit a decision to the effect that March 2, 1961, was comparable to October 3, 1960.

B. *The Exclusions of the Films Did Not Prejudice the Rights of the Defendant.*

Although the trial judge excluded the films, he did permit the photographer to testify that at roughly 300 to 350 feet it was difficult to discern the features

or appearance of persons (Tr. 106). Such testimony was admitted in spite of the fact that it was relevant only for the purpose of discrediting the ability of Windham and Schafer to identify defendant at a distance estimated to be 200 to 300 feet (Tr. 41, 42, 60). If relevant at all, the films would have been merely cumulative to the testimony of the photographer and would have emphasized his testimony far beyond its probative importance. See *U. S.* v. *Hall* (C.A. 2d, 1953), 200 F.2d 957, where the court held that in a marijuana prosecution any error in rejection of a business record was harmless because the witness was allowed to read the record while testifying. See also: *Sprinkle* v. *Davis,* supra; *Meurling* v. *County* (C.A. 2d, 1956), 230 F.2d 167.

It should also be noticed that defendant was identified by *five* witnesses, and that the films would have served only to attack the testimony of Windham and Schafer who did not actually witness the transaction. Unscathed, there remained Love and Gooder who were in the Studebaker, and Putnam who remained at the scene after the sale and who actually approached the defendant while driving around the block (Tr. 66).

In *Kiger* v. *U. S.* (C.A. 6th, 1960), 281 F.2d 551, the defendant, who was charged with bank robbery attempted to refute the identification of nine witnesses by the introduction of a photo of himself showing discoloration and marks of a fight that occurred a day prior to the robbery. The court held that al-

though the photographs should have been admitted, their refusal was not prejudicial in view of the failure to otherwise impair the validity of the identification. In the case at hand, the testimony of the five identifying witnesses was in no way impaired. Thus, the court's refusal to allow the showing of the movies could not produce error.

II. The Trial Court Did Not Err in Refusing to Grant Defendant's Motion for Judgment of Acquittal as to the Transaction of November 23, 1960.

A. *In View of the Evidence, Defendant's Attack on Its Sufficiency Is Frivolous.*

Special employee Love whose person and automobile was searched prior to the November 23, 1960, sale (Tr. 79, 69, 45, 51, 30) testified that while waiting in the Kienow Store lot for defendant, he left his automobile, followed by Windham, to make a phone call for the purpose of completing final arrangements (Tr. 79) for the sale. Upon return to the lot, he moved his car to provide better surveillance for Windham, Gooder and Bisenius who were stationed at other vantage points. He further testified that defendant entered his automobile and after some discussion regarding future transactions handed him five capsules in exchange for $50.00 (Tr. 79-81). The capsules were later identified as containing heroin.

Agent Windham and Officer Bisenius observed the defendant enter and leave Love's automobile from one vantage point (Tr. 29-31, 44-51, 69-75), while Gooder observed (Tr. 7-11) from another. Although they did

not witness the actual transfer of the narcotics, their testimony corroborated Love's identification of defendant at the scene of the crime.

In the appellant's brief, it has been asserted that Love may have obtained the narcotics, exhibit 2, from the telephone booth prior to the alleged sale at the Kienow parking lot. Such an assertion not only presumes that Love fabricated the entire transaction but is manifestly against the weight of the corroborating evidence. In this respect, the evidence shows that Windham followed Love to the telephone booth (Tr. 79, 8, 30, 70) and searched him and the vehicle after the transaction (Tr. 50, 31). The failure to find the $50.00 government advance funds in Love's possession after the alleged sale is strong corroboration of Love's testimony regarding the sale.

The reviewing court is not concerned with weighing the evidence or judging the credibility of the witness but must accept the government's evidence in its strongest light for the purpose of judging its sufficiency. See: *Glasser* v. *U.S.* (1942), 315 U.S. 60, 80, 86 L. Ed. 680, 62 S. Ct. 457; *Buford* v. *U.S.* (C.A. 9th, 1959), 270 F.2d 721, Cert. Den. 362 U.S. 937; *Bridges* v. *U.S.* (C.A. 9th, 1953), 199 F.2d 811. Nor may a reviewing court reject the unimpeached testimony of an informer-accomplice. See: *Hass* v. *U.S.* (C.A. 9th, 1929), 31 F.2d 13; *Ambrose* v. *U.S.* (C.A. 9th, 1960), 280 F.2d 766, F.N. 8.

The foregoing assertion which should have been argued to the jury has been foreclosed by the jury verdict as a matter of law.

III. Defendant Is Not Entitled to a Review of the Trial Court's Instructions, Nor Do the Instructions, as a Whole or Individually, Contain Prejudicial Error.

A. *Failure to Except, as a Rule, Forecloses a Review of the Instructions.*

In *Herzog* v. *U.S.* (C.A. 9th, 1956), 235 F.2d 664, this court in the majority opinion construed Rule 30 of the Federal Rules of Criminal Procedure requiring exceptions to instructions as being complimentary to Rule 52(b) of the Federal Rules of Criminal Procedure relating to "plain error." However, this court in the mentioned case also laid down ground rules for the application of Rule 52(b) and commented upon its past use:

> "This court has not gone overboard in its application of rule 52(b) to situations as here presented, and it does not propose to do so now. In the great bulk of the cases in which counsel have sought to have us consider claims of error in instructions not objected to at the trial we have declined to do so. More than once we have stressed the salutary nature of Rule 30 and the vitally important part it plays in the administration of justice. . . .
>
> In determining whether the giving or the failure to give an instruction warrants a reversal, *the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in light of the factual situation disclosed by the record.*" (Emphasis supplied.)

In the language of Judge Chambers' concurring and dissenting opinion to the cited decision, defendant is attempting to utilize a "shotgun 'plain error' " attack on the instructions. This approach should not be per-

mitted. Taken as a whole and in the light of defendant's failure to except, the instructions were manifestly fair.

B. *Failure to Request an Instruction on the Weight to Be Given to an Informer's Testimony Waived Error, If Any, in Not So Instructing.*

Defendant in his brief concedes that a request for such an instruction was not made (Ap. Br. p. 12). In *Mims* v. *U.S.* (C.A. 9th, 1958), 254 F.2d 654, this court settled any doubt, if there ever was doubt, that the absence of a request for an instruction regarding the weight of an informer's testimony precluded raising the question on appeal. See also: *Zamlock* v. *U.S.* (C.A. 9th, 1952), 193 F.2d 889, 892; *U.S.* v. *Ginsburg* (C.A. 7th, 1938), 96 F.2d 882. This allegation of error in the instructions is patently without merit.

C. *In View of the Trial Court's Entire Charge, the Court's Instruction on Presumption of Innocence Was Correct.*

The instruction given was (Tr. 29):

> "Now, I have told you that this defendant has a presumption of innocence in his favor, and *this presumption of innocence continues throughout the trial and up until such time, if that time ever arrives,* where the defendant is convicted to your satisfaction and beyond a reasonable doubt. The presumption of innocence has the weight and effect of evidence in favor of the accused. You must consider the evidence in the light of this presumption. The presumption of innocence is sufficient to acquit a defendant unless the presumption is outweighed by evidence satisfying

> the jury beyond a reasonable doubt of the defendant's guilt." (Emphasis supplied.)

Defendant apparently complains in his brief that the above instruction carried the connotation that the burden of proof would shift *during the trial* at such point that the jurors believed in his guilt. Construing the words of the instruction reasonably and as a whole, the words must be taken by the jury to mean that the accused is presumed innocent during the trial and *beyond* the trial until such time during their deliberation that they are convinced of guilt beyond a reasonable doubt.

In *Las Vegas* v. *U.S.* (C.A. 9th, 1954), 210 F.2d 732, 749, this court approved the following instruction:

> "The defendants and each of them are presumed to be innocent at all stages of this trial, *unless that time arrives,* if its does arrive—it may not arrive—*that the evidence in the case should convince the jury,* or a member of the jury, that one or all of the defendants is guilty. . . ." (Emphasis supplied.)

See also: *Agnew* v. *U.S.* (1897), 165 U.S. 36, 51, 17 S. Ct. 235, 41 L. Ed. 624; *Holt* v. *U.S.* (1910), 218 U.S. 245, 253, 31 S. Ct. 2, 54 L. Ed. 1021.

Based upon the foregoing authorities and a reasonable construction of the trial judge's instruction, defendant's complaint amounts to frivolous nit-picking.

D. *The Court's Charge Regarding Alibi Was Correctly Given.*

The defendant in quoting the court's instruction on alibi (Ap. Br. 44) has again left out the complete instruction which appears as follows (Tr. 44-45):

> "If you find that he was in Pasco, Washington, at the time that he is alleged to have made this sale in Portland, Oregon, then of course you should find him not guilty. But *he does not have to prove that he was in Pasco, Washington.* It is sufficient if, after all the evidence is in, you have a reasonable doubt as to whether he was present at the time and place of the alleged transaction. It is not up to him to prove it beyond a reasonable doubt, or he doesn't have to prove it by a preponderance of the evidence. He merely has to show you by evidence that there is a reasonable doubt that he was there at that time and place." (Emphasis supplied.)

In spite of the fact that the court specifically charged that the defendant "does not have to prove that he was in Pasco, Washington," the defendant has argued that the instruction might be construed by the jury to mean that defendant must prove that he was in Pasco, Washington. Again, defendant's complaint is frivolous.

Finally, in regard to alibi, defendant asserts that he was entitled to such an instruction in regard to the November 23, 1960, transaction described in the remaining three counts.

A study of defendant's testimony will show that he admitted meeting Love at the Kienow parking lot at *approximately* the time in question on November

23, 1960 (Tr. 119-121). In view of this testimony he was not entitled to an instruction on alibi as to the latter counts in the indictment.

CONCLUSION

Appellee respectfully prays the court to affirm the judgment of the District Court.

Respectfully submitted,

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